IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.1088 of 1993

1. K.S.Lakxmi
2. T.Somasundaram
3. T.Uma
4. T.Saravanakumar
5. Viswanathan .. Appellants

-vs-

1. Venkateswaran
represented by his
Power of Attorney
Balasubramaniam
2. Balasubramaniam
3. T.Santhi
4. T.Jeyanthi
5. T.Chitradevi
6. Minor T.Sasirekha, rep. by her mother
and natural guardian 3rd respondent .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree dated 1.12.92 of the Principal Sub Judge, Coimbatore in A.S.No.5/90 reversing the judgment and decree dated 5.10.88 of the Principal District Munsif, Coimbatore in O.S.No.1799/82. For

!For Appellants : Mr.A.S.Vijayaraghavan

^For Respondents : Mr.T.M.Hariharan
for R2 No appearance for RR1 & 3 to 5

:JUDGMENT

This appeal is directed against the judgment of the learned Principal Subordinate Judge, Coimbatore, made in A.S.No.5 of 1990, whereby the judgment of the trial Court in a suit for permanent injunction was reversed by dismissing the suit. 2. The plaintiff sought for the relief of permanent injunction, stating that the plaintiff and his brother entered into a partition on 11 .2.1957, pursuant to which the plaintiff has been in enjoyment of the suit property; that he has been paying the tax to the municipality; that the defendants' property was situated on the south of the plaintiff's property; that in between both the properties, there is a well, in which the

adjacent owner was given a right to take water; that around the well, there was a shed, which belonged to the plaintiff; that the first defendant has been living in foreign countries; that at his instigation, the second defendant has been attempting to interfere with the plaintiff's possession; that a week before the filing of the suit, the second defendant made an attempt to demolish the shed, which was objected to by the plaintiff, and the same was stopped with great difficulty; that the defendants were attempting to raise construction in an area of 6' x 16', which was situated in between the properties and which exclusively belonged to the plaintiff, and hence, they should be restrained by way of a permanent injunction.

3. The suit was resisted by the defendants, stating that the suit property, measuring 6' x 16' exclusively belonged to the defendants by way of purchase by their father in the year 1948; that the plaintiff had no iota of right in the suit property; that after obtaining an interim injunction, the plaintiff has demolished a wall; that the sale deed in favour of their father would clearly speak about the measurement of the property and its boundaries; that subsequently, when the new building was constructed, it was approved by the municipality, which would clearly establish that the property in question belonged to the defendants; that on the south of the well, the plaintiff had no right or interest in the property, and hence, the suit was to be dismissed. 4. The trial Court framed the necessary issues, tried the suit and granted the preliminary injunction as asked for. Aggrieved, the second defendant took it on appeal. The first appellate Court on enquiry reversed the judgment of the trial Court and dismissed the suit. Hence, this second appeal has been brought forth by the plaintiff, aggrieved over the same. 5. At the time of admission, the following substantial questions of law were formulated by this Court: (1) Whether the judgment and decree of the lower appellate Court are right in that the same is not based on any evidence available on record?

(2) Whether the judgment of the lower appellate Court is correct in arriving at the finding merely on assumptions as to the usage of the disputed site by the defendants? 6. This Court paid its full attention on the rival submissions and had a thorough scrutiny of the materials available. 7. Before the trial Court, both sides have let in evidence and also relied on documentary evidence. It is not in dispute that the properties of the plaintiff and the first defendant are situated adjacent to each other, and in between these two properties, there is a well and a shed also. The property in dispute is a small piece of land, measuring 6' x 16', which is situated on the south of the well. The case of the plaintiff was that the property originally belonged to the father; that there was a division among himself and his brother; that the suit property fell to his share; and that he has been in enjoyment of the same all along. But, on the contrary, the defence plea was that the property belonged to the defendants by way of purchase by their father in the year 1948; that the sale deed would contain not only the measurement of the property, but also its boundaries, and thus, the property in question fell within those boundaries and measurement. According to the defendants, an old construction was removed, and a new construction was raised only on approval of the plan by the Municipality, which would also evidence the fact that the property belonged to the defendants. The first appellate

Court has clearly discussed the evidence and has pointed out that Ex.A1 sale deed, relied on by the plaintiff, did not speak anything about the suit property. Ex.A2, a partition deed, between the plaintiff and one Tirumalaisamy, also did not speak about the property in question. Even Ex.A3, a plan, also does not contain anything, indicating that this property fell within the share of the plaintiff. 8. It is pertinent to note that the plaintiff has not averred in the plaint that the property belonged to him pursuant to Exs.A1 and A2, but has stated that he has been enjoying the same all along. On the contrary, in the document, relied on by the defendants namely Ex.B1, sale deed of the year 1948, under which thei r father purchased the property, the property in question namely 6' x 16' of land is shown. That apart, an Advocate Commissioner appointed by the Court, on inspection, has filed a report and plan. In his plan, the Commissioner has shown the defendants' property as JJHGFELM and that of the plaintiff as ABCDEFGHIJ, and the suit property has also been shown therein as IHGF, measuring 6' x 16'. The Commissioner's report would also indicate that the property has been in possession and enjoyment of the defendants. It remains to be stated that the plaintiff has not raised any objection to the Commissioner's report. Thus, on the documentary evidence available and also on the Commissioner's report, the first appellate Court took a correct view that the suit property namely a piece of land measuring 6' x 16', belonged to the defendants. The trial Court without proper appreciation of evidence, has granted the decree; but, the same was rightly set aside by the first appellate Court. This Court is unable to notice any reason to interfere in the judgment of the first appellate Court, and hence, the second appeal has got to be dismissed. 9. In the result, this second appeal is dismissed, confirming the judgment and decree of the first appellate Court and leaving the parties to bear their costs.

Index: yes
Internet: yes

5-3-2004
To: 1. The Principal Subordinate Judge Coimbatore

2. The Principal District Munsif Coimbatore

3. The Record Keeper VR Section High Court, Madras.

nsv/